Office - Supreme Court, U.S.
FILED
OCT 28 1982
ALEXANDER L. STEVAS
CLERK

No. 82-370

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

MARILYN CARPENTER
Appellant,

V.

JAY S. HAMMOND, GOVERNOR OF ALASKA,
Appellee.

ON APPEAL FROM THE SUPREME COURT
FOR THE STATE OF ALASKA

APPELLANT'S MOTION IN OPPOSITION OF APPELLEE'S MOTION TO DISMISS OR AFFIRM

Fredric Dichter
Dichter & Ploog,
Attorneys-at-Law
701 W. 58th Avenue
Anchorage, Alaska 99502
(907) 276-3644

Counsel for Appellant

TABLE OF CONTENTS

I.

Page

ARGUMENT 1

A. The Order of the Alaska Supreme Court is a final Judgment; this Court has jurisdiction..... 1

B. Appellant has Standing..... 2

C. Appellant's third question was raised below..... 11

II.

CONCLUSION..... 11

TABLE OF AUTHORITIES

CASES:

Baker v. Carr,
369 U.S. 186 (1962)..... 3

Barrows v. Jackson,
346 U.S. 249 (1953)..... 9

Cox Broadcating Corp. v. Cohn,
420 U.S. 469 (1975)..... 2

Dubois v. City of College Park,
375 A.2d 1098 (Md. 1977)..... 5

Jones v. Freeman,
146 P.2d 564 (Okla. 1943)..... 5

Korioth v. Briscol,
523 F.2d 1271 (5th Cir. 1975).... 8

Radio Station WOW, Inc. v. Johnson,
326 U.S. 120 (1945)..... 2

Stiglity v. Schardien,
40 S.W. 2d. 315 (Ky. 1931)..... 6

Swann v. Adams,
385 U.S. 440 (1966)..... 3, 4, 5, 6, 7, 8, 9, 10, 11

Tileston v. Ullman,
318 U.S. 44 (1943)..... 9

Worth v. Seldin,
422 U.S. 490 (1975)..... 8

CONSITUTIONAL PROVISIONS:

Article III, Section 2,
Constitution of the United States.. 4, 7

Article VI, Section 6 of the
Alaska Constitution..... 1

Article VI, Section 11 of the
Alaska Constitution..... 10

A. THE ORDER OF THE ALASKA SUPREME COURT IS A FINAL JUDGMENT: THIS COURT HAS JURISDICTION.

The order issued by the Alaska Supreme Court, with the exception of one state issue remaining under advisement, affirms the judgement of the Superior Court in it entirety. The one issue remaining to be decided deals solely with whether or not House District 2 of the plan satisfies the requirements of Article VI, Section 6 of the Alaska Constitution. The issue is completely unrelated to the federal questions raised in the case and its outcome will in no way affect those questions.

Generally, the final judgement rule precludes review where anything further remains to be determined by a State Court, no matter how dissociated it may be from federal issues which have been finally adjudicated by the highest court

of the State. Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945). In Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), this Court recognized certain exceptions to the rule. One exception exists where the federal issue which has been finally decided will survive and require decision regardless of the outcome of any further state court proceedings. That is the situation in this case. The federal issues are entirely independent of the issue remaining under advisement. They are completely severable. The Alaska Supreme Court has passed on the merits of the federal question by affirming the judgement of the Superior Court and its Order should be treated like any other order affirming the judgement of a lower court.

B. APPELLANT HAS STANDING.

Appellant's attempt to amend her

complaint was not a concession that she lacked standing, but merely an effort to eliminate an unnecessary side issue by alleging additional jurisdictional facts. Appellant's pleadings, as they now stand, meet the jurisdictional requirements of this Court.

Appellee contends that Appellant has shown no injury because she failed to allege that she resides in an underrepresented district. This Court has never held the such an allegation is necessary to establish standing in an apportionment case. In Baker v. Carr, 369 U.S. 186, 205, n.24 (1962), the Court specifically declined to decide that issue. However, the issue arose and was dealt with by the Court in Swann v. Adams, 385 U.S. 440 (1966). In that case the court upheld the standing of plaintiffs who conceded that their districts had received

constitutional treatment under the challenged plan.

Since the plaintiffs in Swann did not allege that they resided in disadvantaged districts, what injury enabled them to satisfy the case or controversy requirements of Article III, Section 2 of the United States Constitution? The Court makes reference to the fact that the plaintiffs had presented the District Court with an alternate apportionment plan which it had rejected, 385 U.S. at 443. But, that rejection can hardly be considered to be the injury which gave the District Court jurisdiction in the first place. The Court also noted that the District Court had consistently denied intervention to other plaintiffs, seemingly treating the appellants as representing other citizens in the State. Id. But, if plaintiffs had alleged no personal injury, how did the District

Court have the jurisdiction necessary to permit them to represent other citizens of the State?

The standing decision in Swann can only be interpreted as a recognition of the principle that any registered voter has a sufficient enough interest in the apportionment of legislative districts that he suffers injury from an improperly drawn plan. The Court of Appeals of Maryland has interpreted Swann in exactly that manner in upholding the standing of an "overrepresented" voter to challenge a municipal apportionment plan. DuBois v. City of College Park, 375 A.2d 1098 (Md. 1977).

The principle underlying Swann has also been recognized by other state courts. The Oklahoma Supreme Court, in Jones v. Freeman, 146 P.2d 564 (Okla. 1943), noted:

> But a citizen has more than the mere right to have his own county or

> district fully represented in the Legislature. Discrimination may result from giving other counties too much representation as well as from giving a particular county insufficient representation. Each citizen has a right to have the state apportioned in accordance with the provisions of the Constitution and to be governed by a legislature which fairly represents the whole body of the electorate, elected as required by the provision of the Constitution.

Id. at 571.

In Stiglitz v. Schardien, 40 S.W. 2d. 315 (Ky. 1931), the Kentucky Supreme Court (formerly the Court of Appeals) considered a challenge to the standing of a plaintiff whose district's population was reasonably close to the ideal population. The court upheld plaintiff's standing, stating that:

> Every citizen, taxpayer, and voter has an undoubted right to have the districts for representatives and senators created in accordance with the Constitution. If is not enough that one district may be of the proper size theoretically, so long as other districts are given greater representation than is warranted by

> the Constitution and their population. The discrimination is just as real and just as wrong whether is be based upon a denial of representation to one locality or be founded upon excessive representation given to another. Indeed, it necessarily operates to bring both results, and in either case the constitutional standard of equality is destroyed. ...If one district is approximately the size that all districts should be, and another district with half the population is given the same or greater representation, the result is inequality in the Legislative Assembly.

Id. at 317.

The Swann decision incorporates these principles in its ruling that all voters suffer harm from a malapportionment. This harm provides the injury necessary for a plaintiff from an overrepresented district to satisfy the Article III requirement of a case or controversy.

But Swann must also be interpreted in light of other rules of prudential standing established by this Court. It has long been the rule that a federal

court will decline to exercise its jurisdiction if the alleged injury is a generalized grievance shared in substantially equal measure by all or a large class of citizens. Worth v. Seldin, 422 U.S. 490 (1975). The rationale for this rule is that when all citizens are equally harmed by some alleged governmental illegality, recourse is possible through the political process. Korioth v. Briscoe, 523 F.2d 1271 (5th Cir. 1975). Swann creates an exception to the generalized grievance rule. It recognizes that, in an apportionment case, any effective recourse to the political process may be barred by the very injury being alleged. The Swann Court was well aware of the long history of futile attempts to solve the problem of malapportionment by recourse to malapportionment by recourse to malapportioned legislatures and it provided for judicial recourse.

Appellee also asserts that Appellant lacks standing to raise claims relating to the military. Although the general rule is that one person does not have standing to assert the constitutional rights of another, Tileston v. Ullamn, 318 U.S. 44 (1943), the doctrine is recognized as a rule of practice which may be dispensed with under special circumstances. Barrows v. Jackson, 346 U.S. 249 (1953). Here again, Swann creates an exception to a prudential standing rule for apportionment cases. Under Swann, Appellant's injury results from any defect in the apportionment plan. In order to remedy those defects she must be able to raise any issue relating to them. Since the defects she alleges relate to Appellee's treatment of the military, her remedy is inextricably tied to the assertion of their rights. If she were not allowed to raise those issues, there

would be no remedy for the injury which Swann recognizes.

An additional factor to consider is that it is now impossible for military and military-related persons to assert those claims for themselves. Article VI, Section 11 of the Alaska Constitution provides for an extremely short 30 day statute of limitations on challenges to an apportionment proclamation. Any attempt by a member of the military to raise the issue is now barred by that constitutional provision.

The inequitable apportionment of the Alaska legislature caused by Appellee's discrimination against the military will be allowed to stand until the 1992 elections unless Appellant's standing to present their claim is recognized.

Appellant meets the standing requirements which Swann establishes for apportionment cases. She has alleged

that she is a qualified voter and she has alleged that the challenged plan contains errors which result in a malapportionment and substantial population variances among the districts. Those allegations are sufficient to establish her standing under Swann v. Adams.

C. APPELLANT'S THIRD QUESTION WAS RAISED BELOW.

Appellant's third question was raised in both the trial court and the Alaska Supreme Court. The issue was briefed at both levels. Plaintiff's Trial Brief, p. 9 - 10; Appellant's Alaska Supreme Court Brief, pp. 14-15. It is fairly included within both Issues 2 and 5 of Appellant's points on appeal to the Alaska Supreme Court.[1]

1.

THE ISSUES PRESENTED

2. Whether the residency test applied only to military personnel and their dependents discriminates

against military personnel and their dependents by subjecting them to a higher standard of citizenship than the rest of the population.

5. Whether the use of a future intent test, while unconstitutional as applied to certain groups for voting purposes, is constitutionally permissible as applied to the military for reapportionment purposes.